United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be Argued by:
James E. Cullum

Docket No. 76-1073

IN THE

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

— against —

HOWARD P. GISKIN,

Appellant.

Appeal from the United States District Court for the Northern District of New York

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BRIEF FOR APPELLEE

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ISSUES PRESENTED

1. Was the reliability of the information furnished by the informant sufficiently shown and therefore properly considered by the Magistrate?

2. Was probable cause established by the search warrant affidavit?

3. Did the search warrant sufficiently describe the place to be searched?

4. Does a guilty plea operate as a denial of the right to contest a partial denial of a motion for a bill of particulars?

5. Was the sentence excessive?

6. Was the appellant properly advised of his right to address the Court at sentence?

STATEMENT OF THE CASE

Nature of Case and Course of Proceedings

The appellant, Howard P. Giskin, was charged in a one count indictment, filed on November 10, 1975, with a violation of Title 21, United States Code, Section 841(a) in that he allegedly manufactured and possessed, with intent to distribute, a controlled substance. He was arraigned on December 1, 1975, and a suppression hearing relating to an illegal search of his residence was held on January 14, 1976. Subsequent to the denial of his suppression motion the appellant entered a plea of guilty on January 19, 1976, while reserving his right to appeal the denial of the suppression motion. The government consented to this reservation. On January 30, 1976, the defendant was sentenced and a notice of appeal was filed. He appeals from the denial of the suppression motion, the excessiveness of the sentence, the partial denial of a motion for a bill of particulars and the alleged failure of the court to grant him the opportunity to address the court at the time of sentencing.

STATEMENT OF FACTS

The Search

Beginning on May 7, 1975, the Arthur Thomas Chemical Company, Philadelphia, Pa., received orders from Educational Research, P.O. Box 721, Saranac Lake, New York, for laboratory equipment and various chemicals, including a quantity of phenyl-2-propanone. (Search warrant affidavit and Supp.H. p.67).[1] This chemical is a precursor used in the manufacture of methamphetamine, a Schedule II controlled substance. (Search warrant affidavit and Supp.H. pp.67, 72). The purchaser placed its orders by telephone and was allegedly represented by a Howard Cooper. (Search warrant affidavit). Mr. Cooper used the Saranac Lake, New York, mailing address and left a telephone number where he could be reached. (Search warrant affidavit). This number was listed to the appellant, Howard Giskin, at the Dannemora, New York, residence which was subsequently searched. (Search warrant affidavit).

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[1] "Supp.H." will hereinafter refer to the pages of the minutes of the suppression hearing held on January 14, 1976, and the decision on the suppression motion and change of plea proceedings held on January 19, 1976.

"Sent." will hereinafter refer to pages of the minutes of the sentencing proceeding held on January 30, 1976.

On August 28, 1975,[2] an individual, who was described in the search warrant as an "informant who had demonstrated a pattern of reliability in the past," went to Giskin's residence.[3] At the residence, which was a cottage on a rural road outside of the Village of Dannemora, New York, he was greeted by Giskin who had white flakes in his hair and beard. (Search warrant affidavit and Supp.H. pp.66, 69). While near the house, the informant detected a strong putrified odor. (Search warrant affidavit and Supp.H. pp. 69, 71,72,73,77). On the same day he advised Drug Enforcement Administration Agents of his observations. (Supp.H. p.81). Agent Mangor then contacted a Drug Enforcement Administration chemist who informed him that the odor detected by the informant was indicative of the manufacture of chemical substances known as amine free bases such as methamphetamine. (Search

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[2]The search warrant affidavit inadvertently stated that this event took place on July 28, 1975. The affiant testified at the Suppression Hearing (Supp.H. pp. 65,66) that he told the magistrate under oath, prior to the issuance of the warrant, that the date was August 28, 1975, only a few hours prior to the issuance of the warrant.

[3]The identity of the informant, Thomas Casey, was disclosed by the government and he testified at the Suppression Hearing at the request of the appellant.

warrant affidavit and Supp.H. pp. 69,71,72,73). Agent Mangor then prepared the affidavit for a search warrant which he brought to the Magistrate in the early hours of August 29. After being placed under oath, he verbally informed the Magistrate of some of the details of the investigation (Supp.H. pp.65-70). The Magistrate was told that the Saranac Lake address was used as a front for purchasing laboratory equipment and precursors for the manufacture of methamphetamine. (Search warrant affidavit and Supp.H. pp.67,68). The warrant was issued and on the same morning a search of the Giskin residence was conducted.

The execution of the warrant resulted in the seizure of a large quantity of methamphetamine along with a complete laboratory used for the manufacture of methamphetamine which, at peak operation, could produce about fourteen pounds of this controlled substance per week. The defendant was alone on the premises and was immediately placed under arrest.

At the Suppression Hearing held on January 14, 1976, the defense called George Barber, a land surveyor, in an attempt to discredit the accuracy of the search

warrant's description of the Giskin premises. He testified that the Giskin residence was a redwood paneled structure with a glass front and deck porch. (Supp.H. p.39). This testimony conformed with the description in the warrant. The warrant described the location of the structure as being 1.2 miles from a certain intersection. At the hearing, Barber testified that there was a similar residence in the area and proof was adduced as to the respective distances of the two residences from the aforementioned intersection. Photographs of the two residences were received into evidence.[4] It was the appellants contention that the close proximity of the similar residences, when compared to the location described in the warrant, invalidated the warrant.

The appellant produced two additional witnesses, Mrs. Sharon R. Giskin and Robert C. Dragoon, whose apparent purpose was to show that the putrified odor referred to in the search affidavit actually came from a truck on the Giskin premises which was allegedly used to haul garbage. (Supp.H. pp.48-63). Neither of the witnesses could state that the truck was on the premises on the 28th or 29th of August or even that it was there at any

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[4]Defense Exhibits B (neighbor) and C (Giskin).

time during the later part of the month of August. (Supp. H. pp. 56, 60).

The appellant also called Drug Enforcement Administration Agent Mangor, informant Casey and Drug Enforcement Administration chemist Fasenello to testify.

In his decision on the suppression motion, Judge Port found that the testimony regarding the garbage truck was exaggerated and difficult to believe (Supp.H. p.97): that the premises were adequately described and distinguishable from the neighboring residence both by physical description and by the inclusion in the warrant of the owner's name (Supp.H. pp.99,100): that the reliability of the informant was adequately shown (Supp.H. pp.98,99): and that upon the facts in search warrant affidavit taken as a whole, the Magistrate had probable cause to issue the search warrant. (Supp.H. p. 99).

The Bill of Particulars

The defense served a motion for a Bill of Particulars sometime in mid-December, 1975. A notice of motion to get the matter before the District Court was never served.

Included in the motion were demands for a record of thd Grand Jury minutes and the names. addresses and telephone numbers of government witnesses.

On January 14, 1976, at the conclusion of the suppression hearing, the motion was brought to the attention of Judge Port who denied those parts of the motion which are set forth above.

The Sentencing

The sentencing took place on January 30. 1976. The defendant was committed to the custody of the Attorney General for a term of three years upon the condition that he be confined in a jail type or treatment institution for a period of 6 months. the execution of the remainder of the sentence of imprisonment being suspended and the defendant placed on probation for that period. Giskin was con[illegible] on bail pending appeal.

At the sentencing both the appellant and his attorney were given the opportunity to speak. (Sent. p. 3).

ARGUMENT

POINT I

THE RELIABILITY OF THE INFORMATION FURNISHED BY THE INFORMANT WAS SUFFICIENTLY SHOWN AND SUCH INFORMATION WAS PROPERLY CONSIDERED BY THE MAGISTRATE IN DETERMINING THE EXISTENCE OF PROBABLE CAUSE.

It is permissible for a Magistrate to consider hearsay information in deciding the question of probable cause in search warrant applications. Moreover, his finding may be based exclusively upon hearsay evidence. (Rule 41(c), Federal Rules of Criminal Procedure). However, Courts have applied conditions to the use of such evidence. In Aguilar v. State of Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584 (1969), the Supreme Court addressed the issue of using hearsay information which came from an informant whose identity is not disclosed in the search warrant affidavit. The Court established a two pronged test for crediting the informant's hearsay. First, there must be underlying circumstances to show how the informant reached his conclusions and Second, the credibility of the informant must be established. Aguilar, supra, 378 U.S. at 114: Spinelli, supra, 393 U.S. at 587. The Second Circuit has most recently restated the Aguilar-Spinelli tests in United States v. Karathanos, Decided

February 2, 1976, Docket No. 75-1322, at Slip Opinion pp. 1717, 1721.

The first prong of Aguilar-Spinelli is satisfied in the present case in either of two ways. First, the search warrant affidavit states that informant "was greeted at the front door of the Giskin residence." Clearly, the informant's observations, which are then set forth in the affidavit, resulted from his personal view at the door of the residence. The test is satisfied in that the information came from personal observation rather than through "neighborhood gossip, conjecture, or mere suspicion." United States v. Karathanos, supra, Slip Opinion at 1717.

The first Aguilar-Spinelli test is further satisfied, if not inapplicable, in that there are no bald assertions by the informant that the defendant is engaged in criminal activity. There are no conclusions that must be justified by a showing of underlying facts. The informant's information consists simply of observations made by sight and smell and is void of general allegations

of criminal conduct.[5] This is clearly distinguishable from Aguilar and Spinelli where the informants made the general claim that the defendants were perpetrating illegal acts. Aguilar, supra, 378 U.S. at 109, Spinelli, supra, 393 U.S. at 414. In those situations it would be necessary to show the facts upon which the informant based his conclusion. (United States v. Ventresca, 380 U.S. 102. at 108, 109: 85 S.Ct. 741 at 746 (1965). In the instant case, however, there are no conclusions drawn. Reference to the informant is made solely to point out specific factual observations. Thus, the first prong of the Aguilar-Spinelli test is inapplicable. See: United States v. Burke, 517 F.2d 377 (2d Cir. 1975).

It is noteworthy that in United States v. Freeman, 358 F.2d 459 (2d Cir. 1966), cert. den. 385 U.S. 882, decided after Aguilar, the Court did not consider the first Aguilar test. The obvious reason was that the search warrant affidavit stated factual observations rather than general

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[5] In this regard the District Court stated: "and I think that the objection also misses its mark because it fails to dstinguish between the informant who is relaying observations and reporting reactions of the senses, of smell and sight, as compared with the informant who is making conclusory statements such as were made in Aguilar and Spinelli. (Supp.H. pp.98,99).

The appellant apparently disagrees with this distinction since his brief repeatedly stated that the informant's information is based on observations rather than conclusions. (Appellants Brief pp. 8, 10 and 11).

conclusions.[6] Where the information is factual, the test is satisfied per se.

The second prong of the Aguilar-Spinelli test also fails to operate as a basis for disallowing the use of the informant's allegations.

In Jones v. United States, 362 U.S. 257, 80 S.Ct. 725 (1960), the credibility of the informant was founded on a statement in the affidavit which alleged that the informant had given correct information on previous occasions. Jones, which was cited in Aguilar, supra, 378 U.S. at 114, is distinguishable from Aguilar, in that the Aguilar affidavit failed to refer to the informant's previous reliability.

The Second Circuit made such a distinction in United States v. Freeman, supra. In that case the affidavit stated that the hearsay was provided "by an informant of previous reliability." Freeman, supra, at 460. The Court distinguished Aguilar by pointing out that while the informant's credibility was not sufficiently demonstrated by referring to him as a "credible person", as was attempted in Aguilar, it was sufficiently shown by referring to his "previous reliability."

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[6] The affidavit stated: ". . . the heroin was seen within the premises on this date by an informant of previous reliability . . . ." (United States v. Freeman, supra, at 460).

While the Court indicated that it would have been better to recite the length of time the agent had known the informant, the number of times he had received information from the informant and a statement as to the accuracy of such information [7], it was sufficient to merely make the assertion regarding his "previous reliability".

In the present case the affidavit used to obtain the warrant stated that the hearsay was given by an "informant" who has demonstrated a pattern of reliability in the past". Certainly, as the District Court pointed out [8], there is no critical difference between "previous reliability", as in Freeman, and "demonstrated a pattern of reliability in the past", as in the case at bar. The synonymous affidavits should be attributed equal validity and the second prong of the Aguilar-Spinelli test is therefore satisfied.

POINT II

THE SEARCH WARRANT AFFIDAVIT ESTABLISHED PROBABLE CAUSE TO BELIEVE THAT EVIDENCE OF A CRIME WOULD BE FOUND AT THE PLACE TO BE SEARCHED

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[7] The Freeman court noted the possibility of challenging the informant's previous reliability at a suppression hearing. 358 F.2d at 463 n.4. It should be pointed out again that Thomas Casey, the informant in the present case, was present and testified at the suppression hearing. See footnote 3, supra.

[8] Supp.A. p.98.

The affidavit of Special Agent Mangor stated that a person alleging to be a Howard Cooper placed an order for laboratory equipment and phenyl-2-propanone. Cooper represented Educational Research, P.O. Box 721. Saranac Lake, New York. It was further stated in the affidavit that said address was believed to be a subterfuge used t. order precursors for the manufacture of methamphetamine. In addition the affidavit alleged that a telephone number used by Howard Cooper was listed to the appellant, Howard Giskin, at his residence on Herron Hill Road, Dannemora, New York, which was the residence subsequently searched. The search affidavit also stated that an informant who had demonstrated a pattern of reliability in the past had been greeted at the front door of the appellant's residence by a male with white flakes of an unknown substance in his hair and beard. While there, the informant smelled a strong chemical odor which was described as "putrified". On the same evening, the affiant contacted a chemist of the Drug Enforcement Administration who informed him that a putrified odor was indicative of amine free bases such as amphetamine or methamphetamine. This information was also set forth in the affidavit. Both the Magistrate and the District Court Judge found that probable cause for the issuance of the warrant existed.

In Spinelli v. United States, supra, the Court set forth some of the guidelines to be followed in determining whether probable cause exists:

> In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause. Beck v. Ohio, 379 U.S. 89, 96, 85 S.Ct. 223, 228, 13 L. Ed. 2d 142 (1964): that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial. McCray v. Illinois, 386 U.S. 300, 311, 87 S.Ct. 1056, 1062 (1967): that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense. United States v. Ventresca, 380 U.S. 102, 108, 85 S.Ct. 741, 745 (1965): and that their determination of probable cause should be paid great deference by reviewing courts, Jones v. United States, 362 U.S. 257, 270-271, 80 S.Ct. 725, 735-736 (1960). 393 U.S. at 419.

In United States v. Ventresca, supra, the Court gave some direction as to the manner of interpreting search warrant affidavits:

> If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of

> elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting. 380 U.S. at 108.

In the present case a common sense reading of the affidavit, taking the contents as a whole, could lead a reasonably discreet and prudent magistrate to believe that evidence of a crime was present on the subject premises. See Dumbra v. United States, 268 U.S. 435 at 441, 45 S.Ct. 546 at 549 (1925).

It is not contended here that the affidavit could not have been better drafted. Obviously, a more thorough recitation of the facts then known to the affiant, the use of an additional detailed affidavit by the informant or a more precisely worded affidavit would have left no doubt that probable cause existed. However, as envisioned in Ventresca, supra, the agent affiant here was a non-lawyer in the midst and haste of a criminal investigation. His good faith efforts should not be regarded now as technically insufficient.

The Government contends also that in deciding the issue of probable cause, reviewing courts should pay substantial deference to the magistrate's determination.

In Ventresca, supra, the Court stated:

> . . . where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. 380 U.S. at 109.

This principle was followed in Jones v. United States, supra, 362 U.S. at 270; Aguilar v. State of Texas, supra, 378 U.S. at 111; Ramirez v. United States, 279 F.2d 712 (2d Cir. 1960); United States v. Freeman, supra, 358 F.2d at 461; United States v. Lewis, 392 F.2d 377 at 380 (2d Cir. 1968). It is a salutary principle which is exceedingly appropriate in the present case.

The existence of probable cause depends on the facts and circumstances of a particular case. Ramirez, supra, at 714. However, it is notable that a similar factual situation arose in United States v. Welebir, 498 F.2d 346 (4th Cir. 1974). In that case the defendant had ordered drugs capable of manufacturing methamphetamine, officers had detected a chemical odor emanating from the defendant's apartment and a reliable informant stated that the defendant intended to set up a laboratory for producing illicit drugs. Id. 498 F.2d

at 349, 350. The magistrate, the District Court and the Court of Appeals, after noting the necessity of recounting these factors in a common sense manner, found that probable cause existed. The factors in the present case, while not identical with Welebir, are similar enough to demonstrate that a reasonably prudent and impartial judicial officer could find probable cause to uphold the search of Giskin's residence.

The appellant seems to contend that by taking each of the allegations in the search affidavit individually, probable cause cannot be found.[9] However, in reading the affidavit, the Magistrate is bound to consider all of the allegations therein together and in their entirety. Spinelli, supra, 393 U.S. at 415. By doing so in the present case the finding of probable cause is explainable as follows:

1. The affidavit states that Educational Research with a Saranac Lake Post Office Box address, purchased laboratory equipment and phenyl-2-propanone. The telephone number of Giskin's residence, rather than a business telephone, was left by the purchaser. The Magistrate could, therefore, reasonably conclude that the purchased items would ultimately reach the Giskin premises.

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[9] See Appellant's Brief, page 8.

2. The affidavit further states that the Saranac Lake address was used to purchase precursors for methamphetamine manufacture. Reading this allegation together in a common sense way with the allegation that phenyl-2-propanone had been ordered for the Saranac Lake address, one can correctly conclude that phenyl-2-propanone is the precursor.[10]

3. By taking the sum of the foregoing hypotheses it is apparent that the Magistrate could reasonably believe that the Giskin residence would probably contain laboratory equipment and a methamphetamine precursor.

4. When the additional statements in the affidavit are incorporated, to wit: that an informant had smelled a strong putrified odor emanating from the residence[11] and that a chemist had stated that this odor was indicative of the manufacture of substances such as methamphetamine, and a composite view of the affidavit is taken, it became perfectly

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[10] The presence of precursors may be used in determining probable cause. E.g. United States v. Noreikis, 481 F.2d 1177 (7th Cir. 1973); United States v. Moore, 452 F.2d 569 (6th Cir. 1971).

[11] There is ample authority for utilizing the existence of odors in determining probable cause. See Ventresca, supra, 380 U.S. at 104 (fermenting mash); Weir, supra, 498 F.2d at 349 (chemical odors); United States v. Pond, 523 F.2d 210, 211 (2d Cir. 1975) (marijuana).

reasonable for the Magistrate to believe that the precursor and the equipment had reached the Giskin premises and that methamphetamine was probably being manufactured there.

In a close case in which the probable cause issue is troublesome the reviewing Court should pay strict attention to the rule that "the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." Ventresca, supra, U.S. at 109.

By necessity, the Magistrate's finding of probable cause would result in his concurring with the affiant's belief that the Saranac Lake address was a subterfuge. In this regard, it is noteworthy that it was not necessary for the affidavit to contain every fact known to the affiant in connection with his belief. In Ramirez, supra at 716, the Second Circuit held that a search affidavit was not defective as a result of the affiant's failure to state the reasons for his belief that a certain white powder was a narcotic. The Court noted that although it would have been better to recite the existence of a chemical analysis, such a recitation was not necessary.

In the present case it would have been better for the agent to include in the affidavit all of the knowledge he possessed which served as a foundation for his belief

that the Saranac Lake address was a subterfuge. However, not only is the failure to do so not fatal, as in Ramirez, but the subterfuge status of the address is demonstrated by a total reading of the affidavit as set forth above.

The appellant suggests that the application for the search warrant was untimely since the affidavit erroneously stated that the informant went to the Giskin residence on July 28 rather than August 28. Everyone involved in this case knew that the even actually took place on August 28, 1975, just a few hours before the search.[12] Although it is unfortunate that the inadvertence was not corrected on the affidavit itself prior to the issuance of the warrant, it must be remembered that the error was one of form rather than substance. There was no correction because the minds of the Magistrate and the affiant were focused on what had actually taken place. Nothing new had been added. To hold now, under these circumstances, that the search was invalid on the basis of such an oversight would be a hypertechnical application of the otherwise sound rule of requiring affidavits.

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[12] The Magistrate was advised of the correct date by the affiant under oath. (Supp.H. p. 66). The informant testified at the Suppression Hearing that the occurrence took place on August 28, 1975. (Supp.H. p. 75).

There are numerous cases which deal with misstatements in search affidavits. However, all of these cases deal with misstatements in favor of the government. See: United States v. Bozza, 365 F.2d 206, 222-24 (2d Cir. 1966); United States v. Perry, 380 F.2d 356 (2d Cir.); cert. den., 389 U.S. 943 (1967); United States v. Pond, supra, n.11; United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973); United States v. Thomas, 489 F.2d 664 (5th Cir. 1973). Even in such cases the misstatements have not been summarily deleted from the Magistrate's consideration. Where, as here, the inaccuracy is not beneficial to the government but purely an unmindful oversight, the spirit of permitting innocent mistake should continue to prevail.

POINT III

THE SEARCH WARRANT SUFFICIENTLY DESCRIBED THE PREMISES TO BE SEARCHED

The search warrant described the premises to be searched as follows:

> Howard Giskin's residence a red wood paneled cottage structure with a glass front and deck porch located by traveling west on Rt. 374 then taking the 1st left turn after leaving the Village of Dannemora, proceeding on a tar road 1.2 miles whereby the residence is on the right side of the road (Herron Hill Road) as proceeding in a south-westerly direction.

That the premises were accurately described is proven by the testimony of defense witness Barber at the suppression hearing. (Supp.H. pp. 24.38.39). He stated that the property was the residence of the appellant: that the property was on Herron Hill Road: that it had a redwood facing, a glass front and a deck porch: and that it was on the right side of the road going in a southwesterly direction. The only possible confusion could be that the property was not exactly 1.2 miles from the left turn off Route 374 and that a neighboring residence was similar in appearance.

Judge Port, using the photographs in evidence, found that the two residences were physically distinguishable. (Supp.H. p.99). The defendant fails to show on appeal any clear error in the lower Court's findings. United States v. Montos, 421 F.2d 215 (5th Cir.), cert. den., 397 U.S. 1022, 90 S.Ct. 1262 (1970). Moreover, Judge Port properly considered the fact that the warrant referred to the Howard Giskin residence rather than the neighbor's residence. See United States v. DePugh, 452 F.2d 915, (10th Cir. 1971), cert. den., 92 S.Ct. 2452.

Furthermore, the testimony of surveyor Barber shows that although the Giskin residence was not exactly

1.2 miles from the turnoff, it was closer to that point than the neighboring residence.[13]

The evidence fully supports a finding that the warrant described the place to be searched with sufficient accuracy and reasonable certainty of identification that it would enable officers to find it with reasonable effort. Steele v. United States, 267 U.S. 498, 45 S.Ct. 415 (1925); United States v. Falcone, 109 F.2d 579, (2d Cir. 1940), aff'd. 311 U.S. 205, 61 S.Ct. 204.

Under Point II of the Appellant's brief, which deals with the description of place to be searched, there is a general complaint regarding the conduct of the agents in executing the warrant. (Appellant's brief p. 14). This matter was never raised at the Suppression Hearing[14] and

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[13] At the suppression hearing Barber testified that the Giskin residence was 1.24 miles, minus 113 ft., from the intersection and that the neighbor's residence was 1.09 miles from the intersection. (Supp.H. p.46). Mathematically, therefore, the Giskin residence was closer to the point referred to in the warrant.

[14] The Appendix to Appellant's Brief, page 31, contains an excerpt from the testimony of Agent Fitzpatrick at a preliminary examination held before the Magistrate on September 5, 1975, pursuant to Rule 5.1 of the Federal Rules of Criminal Procedure. Agent Fitzpatrick was present and available to the defense at the Suppression Hearing, but was never called to testify.

was never cited as a ground for suppression either before or after the Suppression Hearing. It is now raised for the first time on appeal. For this reason, this issue is not a proper subject matter for review by this Court. United States v. Ackerson, 502 F.2d 300, 303 (8th Cir. 1974); see also United States v. Clark, 498 F.2d 535 (2d Cir. 1974); United States v. Ramirez, 506 F.2d 742, 744 (5th Cir. 1975).

POINT IV

THE APPELLANT'S GUILTY PLEA OPERATED AS A WAIVER OF HIS RIGHT TO CONTEST THE PROPRIETY OF THE PARTIAL DENIAL OF HIS MOTION FOR A BILL OF PARTICULARS

It is fundamental that a plea of guilty is an admission of guilt and a waiver of all non-jurisdictional defects in a criminal proceeding. United States v. Doyle, 348 F.2d 715 (2d Cir. 1965); United States v. McMann, 349 F.2d 1018 (2d Cir. 1965), cert. den. 383 U.S. 915, 86 S.Ct. 906 (1966). Obviously a denial of a motion for a bill of particulars cannot be categorized as a jurisdictional issue and should, therefore, be deemed waived.

POINT V

THE SENTENCE WAS NOT EXCESSIVE

The maximum statutory sentence for the crime to which the appellant entered his guilty plea is a term of imprisonment

of not more than 5 years, a fine of not more than $15 000, or both.[15] Giskin was sentenced to a term of 3 years. However the Court directed that he be confined for only 6 months and that he be placed on probation for the remainder of the sentence. It is difficult to conceive that the appellant seriously argues that such a sentence was excessive.

In Dorszynski v. United States, 418 U.S. 424, 94 S.Ct. 3042 (1974) the Supreme Court set forth the general rule.

> We begin with the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end. 94 S.Ct. at 3047.

Since the sentence in this case is well within the statute, it is subject to no further review. United States v. Tramunti, 513 F.2d 1087 (2d Cir. 1975): United States v. Malcolm, 432, F.2d 809 (2d Cir. 1970).

POINT VI

THERE WERE NO ERRORS AT THE SENTENCING OF THE APPELLANT

The following is an excerpt from the sentencing proceedings held on January 30, 1976:

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[15] Title 21 United States Code, Section 841(b)(1)B.

THE COURT: Mr. Giskin, you have heard me talk to other defendants who have appeared before you this morning. And like them, you have the right to make any statement that you care to. You can do that personally, or you can do it through your attorney, or you both may address the Court. Is there anything that you care to state for the Court, personally?

THE DEFENDANT: I would like my attorney to first speak for me.

Thereafter Giskin's attorney addressed the Court and Giskin answered the sentencing Judge's questions (Sent. pp. 5-7). He was then sentenced. At no point did he ask to take advantage of the opportunity to speak which had been clearly offered by the Judge. Moreover, at no point did his attorney object to the proceedings or request that his client be given an additional opportunity to address the Court. Both Giskin and his attorney were aware of Giskin's right to speak.

The Court had satisfied its obligation. The failure of the defense to invoke this right must now be considered a waiver. Hopkins v. United States, 431 F.2d 429 (5th Cir. 1970); Yaich v. United States, 283 F.2d 613 (9th Cir. 1960).

CONCLUSION

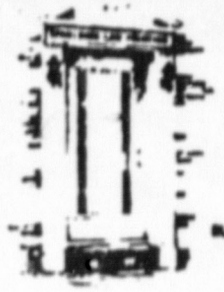
For all the foregoing reasons the denial of the appellant's suppression motion should be affirmed and the appeal dismissed.

Respectfully submitted,

JAMES M. SULLIVAN, JR.
United States Attorney

By

JAMES E. CULLUM
Assistant U.S. Attorney



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LETTER OF TRANSMITTAL

Date: May 12, 1976

Hon. A. Daniel Fusaro, Clerk
U. S. Court of Appeals, Second Circuit
Room 1702 U. S. Court House
Foley Square
New York, NY 10007

Re: U.S.A. v. Howard P. Giskin

~~Index No.~~ Docket No. 76-1073

Dear Sir:

Enclosed please find copies of the above entitled for filing as follows:

~~[ ] Records~~

[10] Briefs

~~[ ] Original Record to be used~~

~~[ ] Original Record to come~~

Very truly yours,

Everett J. Rea

Everett J. Rea

cc: James M. Sullivan, Jr.

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May 12, 1976

Re: **U. S. A. v. Howard P. Giskin**

State of New York)
County of Onondaga) ss.:
City of Syracuse)

Everett J Rea,
Being duly sworn, deposes and says: That he is associated with Spaulding Law Printing Co. of Syracuse, New York, and is over twenty-one years of age.

That at the request of **James M. Sullivan, Jr., Esq., United States Attorney for the Northern District of New York**

Attorney(☒) for **Appellee**

(☒)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix of the above entitled case addressed to:

J. Byron O'Connell, Esq.
O'Connell & Wolfe, Esqs.
Attorneys At Law
66 Margaret Street
Plattsburgh, NY 12901

☒ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Syracuse, New York, **on May 12, 1976.**

☐ By hand delivery

Everett J. Rea
.....
Everett J. Rea

Sworn to before me this **12th** day of **May, 1976.**

Donald C. Greene
.....
Notary Public
Commissioner of Deeds

cc: James M. Sullivan, Jr., Esq.